U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 23 June 2003

CASE NO.: 1999-LHC-3029

OWCP NO.: 07-145364

IN THE MATTER OF

RICHARD SCUDERI,
Claimant

v.

EQUITABLE /HALTER SHIPYARDS,
Employer

and

RELIANCE NATIONAL INDEMNITY
COMPANY, c/o FRANK GATES,
Carrier

APPEARANCES:

J. PAUL DEMAREST, ESQ.
On behalf of Claimant

DAVID S. BLAND, ESQ.
DAVID A. STRAUSS, ESQ.
On behalf of Employer

BEFORE: CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER ON REMAND

On July 30, 2002, the Benefits Review Board remanded the Decision and Order of Administrative Law Judge, James W. Kerr, Jr., to address the issue of whether Claimant established a compensable injury due to pain from the combination of his Kienbock's disease and working

conditions. In remanding the case, the Board affirmed Judge Kerr's decision that Claimant's Kienbock's disease and psychological impairment were not connected to his employment, but stated, that Claimant would nevertheless be entitled to benefits if working conditions cause disabling symptoms. At slip. op. 6, the Board stated:

> An aggravation or progression of the claimant's underlying disease is not necessary for an injury to be compensable; an increase in symptoms resulting in disability is sufficient. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984; *Gardner v. Director, OWCP,* 640 F. 2d. 1385, 13 BRBS 101 (1st Cir. 1981), *aff'g Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979). Thus, the fact that we have affirmed the administrative law judge's findings that claimant's working condition did not cause or aggravate claimant's underlying Kienbock's disease and carpal tunnel syndrome does not end the inquiry, as claimant is entitled to compensation for any disability due to the symptoms resulting from a combination of his wrist injuries and working conditions. *Id.* Moreover, when a compensable injury consists of disabling symptoms that abate when claimant is removed from the work environment, claimant may nonetheless be entitled to benefits for a permanent disability if the evidence establishes that the condition may continue to recur indefinitely. *See Crum,* 738 F.2d at 480, 16 BRBS at 124 (CRT); *Care v. Washington Metropolitan Area Transit Authority,* 21 BRBS 248 (1988). Thus, even where claimant's pain related to his employment abates and his health improves away from the work environment, he may be disabled if the recurrence of symptoms prevents his return to work. *Id.*

The Board further noted that Drs. Stokes, Williams, Brent, and Faust all opined that working conditions could have temporarily aggravated Claimant's pain while at work, with Dr. Stokes stating that work activity could aggravate the pain caused by Kienbock's disease. (EX 18 at 125-138); Dr. Williams stating that heavy work would increase pain and swelling from Kienbock's disease. (EX 23 at 23-24, 38-46); Dr. Brent testifying that Claimant's work caused his Kienbock's disease to become symptomatic. (EX 27 at 36, 37); Dr. Faust stating that repetitive use of the wrists would aggravated Claimant's Kienbock's disease by making his wrists more symptomatic and painful. (EX 30 at 39-40).

The Board then directed me to first consider: (1) whether Claimant sustained symptoms such as pain as a result of his work duties; (2) if so, whether these symptoms disabled Claimant, i.e, precluded his return to his former work; (3) if so, whether Employer established suitable alternative employment; (4) if Claimant is disabled whether based upon the medical evidence the disability is permanent or temporary and then resolve outstanding medical benefit issues and Employer's request for Section 8 (f) relief.

To address those issues raised by the Board and to access the credibility of witnesses, since I did not hear the original case, I scheduled a supplemental hearing on April 29, 2003, at which

Claimant and vocational experts Ms. Nancy Favaloro and Thomas J. Meunier testified.[1] Following the hearing the parties submitted briefs. In Claimant's brief consisting of 66 pages, double space, Claimant recounted the facts established at the hearing before Judge Kerr and myself, and asserted that he suffered severe pain as a result of his employment duties with Employer which caused him to be permanently and totally disabled. Further, inasmuch as Employer failed to establish suitable alternative employment, Claimant is entitled to permanent and total disability from the date of the accident to present and continuing together with necessary and appropriate medical benefits.[2]

Based upon the testimony of Claimant and vocational experts Ms. Nancy Favaloro and Mr. Thomas Meunier, and the entire record as detailed below, I find that: **(1)** Claimant sustained severe pain symptoms associated with hand and wrist swelling as a result of his work duties as a carpenter and electrician; **(2)** these symptoms precluded Claimant from returning to his former work with Employer and were permanent in nature in that they continued to recur whenever Claimant was exposed to light to heavy work assignments such as drilling and grinding, and electrical work; **(3)** Employer through the testimony of Ms. Favaloro established suitable alternative employment with Labor Market Surveys taken on July 28, 1999 and August 1, 2000 (EX-13); **(4)** as of August 12, 1998, when Claimant was examined by Dr. Brent he was at maximum medical improvement (MMI) from a work related pain standpoint with no evidence of wrist or hand swelling due to working conditions having been previously assessed on March 10, 1998 by Dr. Williams with a 15% impairment of function of the left upper extremity and a 10% impairment of function of the right upper extremity (EX-7); **(5)** Claimant was entitled to permanent total disability from August 12,1998 to July 28, 1999 and there after entitled to a scheduled award pursuant to *Potomac Electric Power Company (PEPCO) v. Director, O.W.C.P,* 449 U.S. 265 (1980); and **(6)** Claimant is entitled to medical expenses under Section 7 of the Act for treatment of his work related pain complaints; **(7)** Employer is not entitled to Section 8 (f) relief, in that Claimant's entire work disability is related to

---

[1] References to the transcript and exhibits are as follows: initial hearing transcript- Tr.___; supplemental hearing transcript-Str.___; Employer exhibits- EX-___; Claimant's exhibits-CX-___; Administrative Law Judge exhibits- ALJX-___.

[2] In its brief Claimant never asserted a particular date for MMI nor what medical benefits were reasonable and necessary for treatment of pain, as opposed to the underlying Kienbock's condition and carpal tunnel syndrome for which Employer is not responsible. Presumably, Claimant is seeking unspecified benefits for all lost work from May of 1997 to present, and continuing, without asserting any date for MMI.

In its 24 page, unnumbered, double spaced brief, Employer argued that Claimant's wrist pain was not caused or increased by his employment. Rather, Claimant was destined to and did suffer pain as a result of underlying Kienbock's condition and its chronic degenerative nature. Further, absent work, Claimant's pain continued to increase. Employer also argued that MMI was established on either February 11, 1998 when Dr. Williams released Claimant to return to light work, or on March 10, 1998 when Dr. Williams established impairment ratings and that Claimant is only entitled to a schedule award of temporary total disability of 20 weeks.

only pain complaints associated with his Kienbock's disease which did not constitute any pre-employment or pre-injury disability.

I. Recurrent Severe Pain Associated With Work Assignments:

Claimant's work history for Employer may be summarized as follows: On May 5, 1996, Claimant applied for work with Employer. On May 20, 1996, Employer hired Claimant as a carpenter at its shipyard facilities at the rate of $9.50 per hour. (Str.6,7). As a carpenter, Claimant performed a variety of shipbuilding tasks including ship fitting, cutting and polishing aluminum, grinding, tacking, and welding. These tasks required use of heavy, commercial grinders, drills and saws to installed insulation and built state room walls on yachts. (Str. 9-12). On September 2, 1996 and January 6, 1997, Claimant received $.50 per hour merit increases and on January 27, 1997 was reclassified as an electrician receiving an additional $.50 per hour merit raise on May 12, 1997. (EX-15, p. 16). As an electrician, Claimant performed light work installing wires on ship main consoles. (Str. 56, 57).

From September 29, 1997 through February 15, 1998, Claimant was on medical leave during which time he underwent two surgeries, (a bilateral carpal tunnel decompression on November 8, 1997 and a left wrist arthrodesis on November 25, 1997 by Dr. Williams). Prior to the surgeries Employer reassigned Claimant to its tool room where he issued tools and supplies to morning crews. During this same period Claimant also worked in the safety trailer with safety manager Kevin Couch where he filed documents, and in a guard station where he watched the employee parking lot to prevent auto thefts. On February 16, 1998, Claimant returned to work performing light electrical work marking wires with tags where he remained through March 2, 1998, when he again went on medical leave due to continued hand and wrist swelling and pain. (Str. 14-17; EX-7 and15). Claimant has not returned to work since March 2, 1998.

The records contains clear and uncontradicted testimony that Claimant experienced severe and recurrent hand and wrist pain because of his carpentry and electrical work for Employer.[3]Claimant testified and the record showed that he worked without incident from May 20, 1996 to May 1997 when he began to experience severe pain, weakness, numbness and tingling in both wrist associated with the use of grinders and drills. Claimant reported this condition to his supervisors, who in turn, gave him a helper and allowed him to take off work on Saturdays. From August 1996 to July, 1997, pain levels increased forcing Claimant to seek first aid treatment from safety manager and paramedic, Kevin Couch. For a period of about 1 ½ months(May 17 to July 3, 1997) Couch iced down Claimant's hands 1 to 3 times a day and then on July 3, 1997 referred Claimant to company physician, Dr. A. Friedrichsen, who saw Claimant on 3 occasions, put Claimant

[3] Claimant also testified that he experienced severe pain while working in the tool room associated mainly with manipulating objects. As a result Claimant allowed employees to get their own tool and fill out the necessary paper work. (Str. 14, 15). Tool room work although designated by Employer as light duty involved heavy work. (Str.49).

on light duty and referred him for further evaluation to orthopaedic hand surgeon, Dr. Stokes. (CX-4,16, 22; Tr.35-52).

A review of Claimant's wage records indicates that Claimant suffered a loss of wage earning capacity from the month and a-half prior to treating with Dr. Friedrichsen May 19, 1997 to September 28, 1997, the date Claimant left work on medical leave. *See e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 1549-50 (9th Cir. 1991) (finding a loss of wage earning capacity when there was a decrease in the number of hours worked post-injury, roughly the same amount of work was available to the employee after his injury, and when the injured employee testified that long hours of work caused pain); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45, n.5 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 26-27 (1999). *See also* 33 U.S.C. § 908(e) (2003). His stipulated, pre-injury average weekly wage was $504.52. Claimant's average weekly wage from May 19, 1997 to September 28, 1997 was $452.24, (EX 15), representing a loss of wage earning capacity of $52.88 per week, which results in a temporary partial disability benefit of $34.85 per week.[4] 33 U.S.C. § 908(e).

Dr. Stokes evaluated Claimant on September 16, 1997 and opined following that examination that Claimant had stage II to III Kienbock's disease of the left wrist and possibly stage I Kienbock's disease of the right wrist, plus bilateral carpal tunnel syndrome for which conditions he recommended surgery. (EX-6, pp 3, 4). Following MRI testing on September 25, 1997, Dr. Stokes confirmed his initial impression, again recommended surgery, and stated that neither the Kienbock's disease nor the carpal tunnel syndrome were work related. (EX-6, pp.7, 8). On January 18, 2000, Dr. Stokes examined Claimant again and found stage IV Kienbock's disease of the left wrist with x-ray evidence showing a stage II Kienbock's disease of the right wrist. Claimant was also status post-bilateral carpal tunnel decompression as well as status post-intercarpal arthrodesis of the left wrist, which had united, but nevertheless, had progressed to a stage 4. Claimant had no symptoms of carpal tunnel syndrome which had been totally relieved by the carpal tunnel decompressions performed in November, 1997. Dr. Stokes again opined that neither the Kienbock's nor carpal tunnel problems were work related. (EX-6, pp. 24-30).

Following the hand surgery, Claimant testified that instead of experiencing an improvement in symptoms he had constant pain throughout the day, as opposed to pre-surgery, when pain occurred only when he moved his hands in the wrong direction. (Tr. 69,70; Str. 51-54). As a result, Claimant although released to return to work, eventually had to stop work on March 2,1998. In addition, pain levels increased to the point he was unable to write with his dominant right hand and has difficulty performing simple tasks such as brushing his teeth. Claimant also experienced difficulty sleeping at night due to constant hand and wrist pain. (Tr. 70-75; Str. 17,18).

---

[4] I do not find that an award of total disability during this time period is appropriate based on Claimant's degree of pain and his work as performed. Claimant was able to work satisfactorily for pay, and when pain prohibited Claimant from performing his duties, he temporarily quit working or attained medical treatment from Mr. Couch. No showing was made that his was sheltered or beneficent employment.

On March 10, 1998, Dr. Williams issued a report regarding Claimant's past surgeries and recent examination of March 9, 1998. At page 2 of the report, Dr. Williams stated as follows:

> On March 9, 1998, Mr. Scuderi returned with his wife stating that he had been working but that the job was not entirely light in that he had to do grinding, drilling and climbing on boats. He had some swelling of the wrist. The right wrist had a normal motion without swelling; the left had limited motion from the limited wrist arthrodesis. Carpal tunnel incisions were welled-healed and he appreciated sensory stimuli in the fingers.
>
> His prognosis is guarded because he has Kienbock's disease of the right wrist and limited arhrodesis of the left wrist. The prognosis for the carpal tunnel syndrome is very good since the median nerves have been decompressed.
>
> It is estimated he has approximately 15% impairment of function of the left upper extremity and 10% impairment of function of the right upper extremity.
>
> The causes of Kienbock's disease is unknown. It is not due to the patient's working as an electrician unless he sustained an injury; this has not been reported in his history to my knowledge. I did tell him that working with this condition may cause pain but this would not be a cause for the condition. I also explained to Mr. Scuderi and his father when they first saw me that the Kienbock's condition was a conditioned of undetermined and unknown cause. Unless there is additional history that I have not been apprised of, I do not know at what point there was an aggravation of the Kienbock's condition by his job as an electrician. To my knowledge, there was no traumatic event that occurred during his employment to explain the Kienbock's disease or an aggravation of it. If I am in error for that assumption, please let me know.

Following Dr. Williamsèxamination, Claimant sought another opinion from Dr. Brent who saw Claimant on August 12, 1998; June 16, and November 8, 1999; and March 27, 2000. At the August 12, 1998 visit, Claimant complained of bilateral wrist pain with evidence of Kienbock's disease on the left wrist for which Dr. Brent recommended possible additional surgeries to include proximal roll carpectomy or fusion. Despite the pain there was no evidence of wrist swelling or any other evidence of work place trauma. While Dr. Brent discussed the possibility of carpectomies or wrist fusion these procedures were recommended so as to address the underlying Kienbock's disease, and not because of wrist pain associated with work activities. On the second visit of June 16, 1999, Dr. Brent found a non-united left fusion with marked degenerative changes in the left wrist due to Keinbock's disease and with pain and degenerative changes in the right wrist. On the third visit of November 8, 1999, Claimant's condition was unchanged with Claimant continuing to complain of

bilateral wrist pain. Dr. Brent then referred Claimant to Dr. Faust. On the fourth visit, Claimant's condition was unchanged except for a little lessening of pain in the right hand. (CX-7).

Dr. Faust examined Claimant on January 7, May 16, and June 21, 2000. As of the January 7, 2000 visit, the left wrist fusion had taken and was solid as of January 30, 1998. Dr. Faust opined that Claimant had bilateral Kienbock's disease with the right wrist resolved with an excellent result with possible consideration of future surgery of the left wrist involving removal of the lunate. On April 17, 2000, Dr. Faust after reviewing an MRI of the right wrist, opined that Claimant did not have Kienbock's disease of that wrist and did not require further treatment. Subsequent visits showed no change in Claimant's condition, except for right hand thumb pain. (CX-6).

II. Date of Maximum Medical Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In the present case, it is clear by August 12, 1998, Claimant was experiencing no work related symptoms, and thus, from a work standpoint his condition has stabilized. Indeed, Claimant had sought no treatment since his last visit on March, 9, 1998 with Dr. Williams. Thus, by August 12, 1998, Claimant was at maximum medical improvement (MMI) regarding work place symptoms with recommendations for future treatment to address the underlying Kienbock's disease for which Employer was not responsible. While Employer would have me find Claimant at MMI as of either February 11, 1998, when released by Dr. Williams to return to work, or as of the March 10, 1998 report of Dr. Williams, I find neither date appropriate, inasmuch as Claimant continued to experience

pain associated with work activities when he resumed work in February, 1998, which pain was still present as of the March 10, 1998 report.

III. *Prima Facie* Case of Total Disability

Employer does not contest Claimant's inability to perform his past work. Indeed, Claimant's testimony at both the first and second hearing confirmed this fact. Employer, however, would have me find Claimant at MMI as of either February 11, 1998 or March 10, 1998, at which point it would have me apply the schedule at 33 U.S.C. § 908(c)(3). However, as noted below, it is inappropriate to apply the schedule before a claimant reaches MMI and Employer establishes suitable alternative employment.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 +BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 43, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999)(crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). While an employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. Employer failed to do so until Ms. Favaloro's July 28, 1999 labor market survey. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions: (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

Under *Potomac Electric Power Co. v. Director, OWCP*, 101 S. Ct. 509, 449 U.S. 268, 66 L. Ed. 2d 446 (1980), an injured employee who suffers a scheduled injury is only entitled to benefits based on the schedule in Section 8(c) of the Act 33 U.S.C. § 908(c) (2002). The schedule is only applied when a claimant has a permanent partial disability, which necessitates that the claimant reach maximum medical improvement. *Id*; *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). Prior to reaching maximum medical improvement, the claimant is either entitled to temporary total disability benefits or temporary partial disability benefits. 33 U.S.C. § 908(b) & (e) (2002). Once a claimant establishes a *prima facie* case of total disability by demonstrating that he cannot resume his former job, the claimant is presumed totally disabled even after reaching maximum medical improvement under Sections 8(a), and the scheduled award cannot apply until the employer demonstrated evidence of suitable alternative employment showing that the claimant's disability is partial and not total. 33 U.S.C. § 908(c) (2002); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

In this case the credible medical evidence shows, via Dr. Williams' testimony, that Claimant retained the functional capacity to do light work with non-repetitive use of the hands and leaning on his arms. [EX-23, pp 14,15 (June 15, 1998 deposition)]. Dr. Brent on the other hand, would restrict Claimant to use of the right (dominant) hand with lifting up to30 pounds occasionally, with the ability to write, answer the phone, and punch computer keys. [EX-27, pp 23-25 (deposition of December 20, 1999)]. Dr. Faust as of his July 18, 2000 deposition, assessed Claimant able to do light work in accord with the FCE of March 29 and 30, 2000 by Emile George Schmidt, which limited Claimant to light work avoiding repetitive use of the hands. (Ex-29, pp65-75)[5]. While Claimant testified that

[5] Ms. Favaloro testified that she contacted Dr. Stokes about Claimant's work capacity and was informed by Dr. Stokes, that Claimant could return to work that involved writing and occasional use of tools and cash register operation. (Str. 114, 115). This conversation took place

he could not use either his right or left hand for non-repetitive work, and Vocational Expert, Tom Meunier, confirmed this limited use of his hands as demonstrated on filling out tests and questionnaires and doing a peg board test, I am persuaded based upon the medical testimony, medical exhibits, and the FCE, that Claimant can do light work lifting up to 30 pounds with occasional or non-repetitive uses of his hands .

IV. Suitable Alternative Work

Claimant and Vocational Experts, Ms. Favaloro and Tom Meunier, provided testimony on the issue of suitable alternative work. (SAE). Ms. Nancy Favaloro testified that based upon a capacity to do light work lifting up to 30 pounds occasionally with non-repetitive or occasional use of his hands and considering his transferable skills and abilities, Claimant could perform the following jobs identified on her July 28, 1999 Labor Market Surveys. (Str.117-132. 149-152; EX-13). In Ms. Favaloro's opinion, Claimant had obtained and maintained employment in a variety of settings throughout his career and was able to compete for each of the following jobs.

Unarmed Security Officer: This company provides security services to a high-rise office building. He will have concierge type duties, that is, greeting people and watching security monitors. He may also direct people as to where the elevators are located, etc. A clean police record is required. He will complete incident reports when necessary. It is an unarmed position so there is no apprehending of any perpetrators. He is instructed to make a telephone call to the appropriate authorities if an area is perpetrated. He will alternately sit, stand and walk in this job with no lifting involved. On a rare basis, he may lift a fire extinguisher of approximately 30 pounds and this can be done with his less effected upper extremity. Wages are $6.00 to $7.00 per hour at entry level.

Checker: This company provides on the job training to a worker who will meet people as they exit the airport. He will check off a slip according to which hotel they are going to and give it to the driver who will then transport them from the airport. He will alternately stand and walk while working and can sit during breaks or lunch periods. He does not assist customers in any way with their luggage. Wages are at least $5.50 per hour.

Unarmed Gate Guard: This worker will learn to control access to a specific area. The worker will alternately sit, stand, and walk. He may walk on an hourly or every other hour basis and carry a 5 pound clock that is usually worn around the neck. He will walk for approximately fifteen minutes. There will be certain locations where he will take this clock, which is like a key, and put it into a certain area to indicate that the area is secure at that particular time. He may complete incident reports when necessary. Wages are $5.15 to $7.00 per hour depending on the post.

---

apparently after Dr. Stokes second evaluation of January 18, 2000 and Ms. Favaloro's second Labor Market Survey of August 1, 2000.

Ms. Favaloro also identified similar positions on her August 1, 2000, Labor Market Survey. Vocational Expert, Tom Meunier agreed with Ms. Favaloro, that all the jobs she listed Claimant could do if he was limited to light work with non-repetitive use of the hands, but testified based upon his own testing of Claimant, which included a peg board test and completion of various written tests, Claimant was not able to do any of the jobs listed by Ms. Favaloro, and further, that he did not know of any jobs Claimant could obtain and successfully perform over a period of time. (CX-8,14; Str. 88-91). On cross, Mr. Meunier admitted he did not perform any labor market survey or contact any employers named on the 1999 Labor Market Survey, but that if the jobs of unarmed security guard and checker as identified by Ms. Favaloro were accurate, then Claimant could perform those jobs as described. However, Mr. Meunier testified that the only way to determine Claimant's work capacity is for Claimant to actually try to perform jobs that doesn't require frequent or repetitive use of the hands. (Str. 92-101).

Claimant admitted filling out work applications but not attempting any work since Employer. Claimant testified that he could not work as a unarmed security guard or checker because of his inability to lift a 30 pound fire extinguisher, write reports, spell, lock and unlock doors, and answer the phone. (Str. 20-28, 31,32, 37,38, 39-41). [6]

Inasmuch as I find the medical opinion of Drs. Faust. Williams, Brent, and the FCE to be more reliable than either Claimant or Mr. Meunier's testimony, I find that Employer established suitable alternative employment with Ms. Favaloro's July 28, 1999 Labor Market Survey, wherein she first identified unarmed security guard and checker positions. Thus, Claimant is entitled to temporary total disability from September 29, 1997 through August 11,1998, permanent total disability from August 12, 1998 through July 28, 1999, and thereafter is entitled to a schedule award under 33 U.S.C. 908 (c)(3) with a 15% disability of the left wrist and a 10% disability of the wright wrist. [.15 x 244 weeks x $504.52 (AWW) = $ $18,465.43 for left wrist and .10 x 244 weeks x $504.52 for the right wrist or $12,310.28].

V. Medical Treatment

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988). The employer bears the burden of showing by substantial evidence that

[6] Psychological testing in April, 1998, showed Claimant with a verbal I/Q of 119, performance I/Q of 126 and a full scale I/Q of 125 showing superior intellectual functioning but with deficits in math and spelling performance.(EX-28, pp.628-632). With this intelligence ability, Ms. Favaloro testified Claimant could do all the jobs listed on her Labor Market Surveys.

the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975) (stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ).

In this case, while Employer is not responsible for the underlying Kienbock's disease and related carpal tunnel, Employer is liable for surgeries to relieve the pain and wrist swelling caused by work related activities. Employer is also responsible for medical expenses associated with Claimant's treatment for work related wrist and hand pain symptoms which includes any out of pocket expenses Claimant had to pay for treatment of these symptoms by Drs. A. Friedrichsen, Robert Steiner, Walter H. Brent and Claude Williams, up to an including his treatment on August 12, 1998. After August 12, 1998, there is no evidence of any further treatment for hand or wrist pain associated with Claimant's work for Employer. Rather, the medical treatment is related to the underlying Kienbock's disease for which Employer is not responsible.

VI. Section 8 (f) Relief

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir.1997). It is the employer's burden to establish the fulfillment of each of the above elements. *See Peterson v. Colombia Marine Lines*, 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986).

In establishing the occurrence of a second injury to the employee, it has been clearly established that a work-related aggravation of an existing injury constitutes a compensable injury for purposes of section 8(f). *Ashley v. Tide Shipyard Corp.*, 10 BRBS 42, 44 (1978); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991), *aff'g* 22 BRBS 453 (1989). However, there must be a showing of actual aggravation. If the results are nothing more than a natural progression of the pre-existing condition, it cannot constitute the required second injury. *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), *aff'g Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986); *Souza v. Hilo Transportation & Terminal Co.*, 11 BRBS 218, 223 (1979). Additionally, the Board has upheld the denial of Special Fund relief where the ALJ has found the aggravation too minimal to have contributed to the employee's ultimate disability. *Stokes*, 18 BRBS at 241.

In this case, Claimant clearly sustained an additional injury, i.e. recurrent wrist pain. However, there is no evidence to show that the underlying condition, Kienbock's disease, existed prior to his employment with Employer. Rather, the Kienbock's disease only became manifest while working for employer. Thus, Employer failed to show a pre-existing injury related to Claimant's Kienbock's disease. Regarding Claimant's psychological problems, there is no question that Claimant had severe psychological problems (panic attacks with agoraphobia, personality disorder, substance abuse,) which existed prior to his employment. However, Judge Kerr found and the Board affirmed, the fact that Claimant's psychological condition was not caused or aggravated by his employment. Claimant's psychological did not contribute to his work related disability. Rather, Claimant's inability to perform his past work was due solely to his Kienbock's disease and the pain associated with use of his hands at work. Accordingly, Employer is not entitled to Section 8(f) relief.

VII. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom.* Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See* Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VIII. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

IX. ORDER

Based upon the foregoing findings of fact and conclusions of law and upon the entire record, I enter the following Order

1. Employer shall pay to Claimant temporary partial disability benefits pursuant to 33 U.S.C. § 908(e) for the period of May 19, 1997 to September 28, 1997, based two-thirds the difference between Claimant's pre-injury average weekly wage of $504.52 per week, and a reduced wage earning capacity of $452.22 resulting in a temporary partial compensation rate of $34.85 per week..

2. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908 (b) of the Act from September 29, 1997 to August 11, 1998. Compensation shall be based on an average weekly wage of $504.52 with a corresponding compensation rate of $336.31, pursuant to Section 906(b)(2) of the Act.

3. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908 (a) of the Act from August 12, 1998 (MMI) to July 28, 1999 when SAE was established based upon an average weekly wage of $504.52 with a corresponding compensation rate of $336.31.

4. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908 (c) of the Act for a schedule 15% injury to the left wrist of $18,465.43 (.15x 244 weeks x $504.52) and for a schedule 10% injury to the right wrist of $12,310.28 (.10 x 244 weeks x $504.52).

5. Employer shall reimburse Claimant for all medical expenses he paid for treatment of wrist pain associated with his work for Employer by Drs. A Friedrichsen, Robert Steiner, Walter Brent, and Claude Williams up to August 12, 1998 pursuant to Section 7(a) of the Act.

6. Employer is entitled to a credit for all compensation paid to Claimant, including payments for sick leave.

7. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52 week U .S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C.§ 1961.

8. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE